



IAC-FH-AR-V7

**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: OA/16276/2013

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 30 September 2014**

**Determination Promulgated  
On 24 November 2014**

**Before**

**UPPER TRIBUNAL JUDGE ALLEN**

**Between**

**ENTRY CLEARANCE OFFICER - ISLAMABAD**

Appellant

**and**

**MUDASSAR HUSSAIN**

Respondent

**Representation:**

For the Appellant: Mr P Nath, Senior Home Office Presenting Officer

For the Respondent: Mr D Hayes, Solicitor of Turpin & Miller LLP

**DETERMINATION AND REASONS**

1. This is the appellant's appeal against a decision of a First-tier Judge on 28 July 2014 allowing the appeal of Mr Hussain against the Entry Clearance Officer's decision of 22 July 2013 refusing to grant entry clearance.
2. I turn to the decision that was made by the Entry Clearance Officer. The essential issue of concern was that of the genuineness and subsistence of the relationship that Mr Hussain, whom I will hereafter refer to as the appellant as he was before the

judge, has with his wife, the sponsor, and whether they intended to live together permanently in the United Kingdom.

3. I need say nothing more about that I think because the judge allowed the appeal in relation to that and there is no challenge to that decision on behalf of the Entry Clearance Officer. But the respondent went on to say as follows:

“In refusing the application no determination has been made as to whether the applicant meets the minimum of income and accommodation requirements under Appendices FM and FM-SE of the Rules. However we have assessed that regardless of whether the minimum income and accommodation requirements are met. The application falls for refusal under the Rules.”

As regards how that issue was addressed at the hearing, the judge allowed the appeal in relation to subsistence and intention and that was an end of that matter.

4. Paragraph 22 of the determination is concerned with this remaining issue. The judge noted that the Entry Clearance Officer had chosen not to examine the financial documents presented and went on to say

“The detailed financial documents were placed before me and the Presenting Officer said she was not in a position to assess those documents. They therefore remain unchallenged. They are to be viewed in the light of the open and truthful evidence given to me. I accept those documents and they show that the financial requirements of Appendix FM are met.”

5. That is the essence of it for these purposes and the grounds are commendably brief: that the judge erred in law in failing to consider adequately the financial requirements set out in the relevant Rule as regards maintenance and also in relation to accommodation and permission was granted on the basis that it was arguably necessary for the judge to say more than that the documents showed that the requirement was met.
6. Then we have a Rule 24 response which summarises the evidence that was set out in the skeleton argument that was placed before the judge regarding earnings and also notes the position as regards accommodation. I think on accommodation it may be necessary to go back to the determination briefly. The evidence of the sponsor was, and she was found to be credible, that they would live in the family house here, her mother would decide who slept where. There are four bedrooms and she lives with her mother and father and there was no mention of anybody else living in the house. As I say again, it is a matter that was not specifically addressed in the decision letter.
7. The first issue is whether there was indeed a point before the judge as to support and accommodation in light of what was said in the decision letter. Mr Nath is of course right to say on the authority of Kwok On Tong that all the issues remain live before a judge but it does put the judge in some difficulty, I think, if there is an overt

reference to no decision having been made as to whether the applicant meets the minimum income requirements under the relevant appendices of the Rules and where it does not appear that the Kwok On Tong point was made by the Presenting Officer at the hearing, the officer simply said she was not in a position to assess the documents and did not examine those documents.

8. My view on this is that the judge would have been entitled in fact to say no more or indeed potentially less than he did on the point. There was no adverse decision in relation to this. The matter was not raised by the Presenting Officer and the only live issue, I think, which can properly be said to have been before the judge was that of the subsistence of the marriage and the couple's intentions and the judge found in their favour on that and his decision was not challenged in relation to that.
9. If I am wrong in that regard then I think that the judge was entitled to say no more than was actually set out in paragraph 22. Mr Hayes has helpfully included extracts from relevant authorities on the duty to give reasons and the obligation to explain in clear and brief terms the reasons. The judge accepted the documents, found the evidence to be credible and concluded that the financial requirements of Appendix FM were met. That, I think, was adequate so as an alternative finding I think the judge's determination cannot be impugned on that basis.
10. If I am wrong in that regard then one turns to the calculations that were put forward to the judge to show that the sponsor earned over £18,600 a year and I looked at those before the hearing. They do show income in the relevant period before the decision which could properly lead the judge to conclude that the minimum earnings requirement was met and therefore on that alternative basis the appeal, if the judge had come to address it, would also fall to have succeeded.
11. As regards accommodation, the intention was that they would live in the family home. It is not a matter on which issue was taken earlier, as I say, and I think the evidence, bearing in mind the positive credibility findings, was such that it was entirely open to the judge to accept that the requirements of the Rules on accommodation were met also. Accordingly his decision allowing the appeal on all grounds is maintained.
12. So for all these reasons I consider that the appeal was properly allowed by the judge and the decision allowing the appeal is therefore maintained.

### **Supplementary Issue**

13. Mr Hayes has also applied for a wasted costs order against the respondent, arguing, in essence, that it was unreasonable to seek permission to appeal having failed to take a point on the financial requirements issue. He provided case law (Ridehalgh v Horsefield and Isherwood [1994] EWCA Civ 40 and Odundu and Abdussalam v SSHD [2014] UKUT 377 (IAC) on the ambit of the wasted costs jurisdiction.

14. Mr Nath was given seven days in which to respond. In his response he argues that the Tribunal has no power to award costs on the basis suggested by Mr Hayes. To address this argument it is necessary to consider the relevant statutory and other materials.

15. The Tribunals, Courts and Enforcement Act 2007 section 29, states as follows:

“29. Costs or expenses

- (1) The costs of and incidental to –
  - (a) all proceedings in the First-tier Tribunal, and
  - (b) all proceedings in the Upper Tribunal, shall be in the discretion of the Tribunal in which the proceedings take place.
- (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.
- (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.
- (4) In any proceedings mentioned in subsection (1), the relevant Tribunal may –
  - (a) disallow, or
  - (b) (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with Tribunal Procedure Rules.
- (5) In subsection (4) ‘wasted costs’ means any costs incurred by a party –
  - (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or
  - (b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it is unreasonable to expect that party to pay.”

16. The relevant provisions of The Tribunal Procedure (Upper Tribunal) Rules 2008 state as follows:

“Order for costs

- 10(1) The Upper Tribunal may not make an order in respect of costs (or, in Scotland, expenses) in proceedings transferred or referred by, or on appeal from, another tribunal except –
- (aa) in a national security certificate appeal, to the extent permitted by paragraph (1(A);

(a) in proceedings [transferred by, or on appeal from], the Tax Chamber of the First-tier Tribunal; or

(b) to the extent and in the circumstances that the other tribunal had the power to make an order in respect of costs (or, in Scotland, expenses).

(1A) In a national security certificate appeal – (.. not applicable)

(2) (Not applicable)

(3) In other proceedings, the Upper Tribunal may not make an order in respect of costs of expenses except–

(a) in judicial review proceedings’

(b) ...

(c) section 29(4) of the 2007 Act (wasted costs) and costs incurred in applying for such costs;

(d) if the Upper Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings;

(e) ... not applicable”

17. The relevant provisions of The Asylum and Immigration Tribunal (Procedure) Rules 2005 state as follows

“23A

(1) Except as provided for in paragraph (2), the Tribunal may not make any order in respect of costs (or in Scotland, expenses) pursuant to section 29 of the Tribunals, Courts and Enforcement Act 2007 (power to award costs).

(2) If the Tribunal allows an appeal, it may order the respondent to pay the appellant an amount no greater than –

(a) any fee paid under the Fees Order that has not been refunded; and

(b) any fee which the appellant is or may be liable to pay under that Order.”

18. If the matter is governed solely by s.29(3) of the Tribunals, Courts and Enforcement Act, then subject to one point, considered below, Mr Nath is correct, since Rule 10(1) of the Tribunal Procedure (Upper Tribunal) Rules limits the Upper Tribunal’s power to make an order in respect of costs to the extent and in the circumstances that the First-tier Tribunal had the power to make such an order, and in the instant case the judge made a full fee award which is all he can do under Rule 23A. But this argument depends on an interpretation of s.29 that, in effect, limits the ambit of an award of costs in either Tribunal to what is provided in the respective Procedure Rules. However, s.29(4) which makes provision for wasted costs orders, is arguably not to be read down in light of s.29(3) following on, as it does, from the qualification in s.29(3).

19. There is specific provision in Rule 10(3)(c) for a wasted costs order in the Upper Tribunal “in other proceedings” (Rule 10(3)). The meaning of “other provisions” is unclear. It is clearly not a reference to judicial review proceedings, since they are specifically referred to in Rule 10(3)(a). The only other proceedings with which UT (IAC) is concerned are statutory appeals and the power of the Upper Tribunal to make an order in respect of costs in an appeal from another Tribunal is, as set out above, limited in the terms of Rule 10(1)(b). But even if there is on the face of it no scope within Rule 10 for a wasted costs order by UT(IAC) in a statutory appeal, the point concerning the ambit of s.29(4) remains and it is relevant to note paragraph 11 of Odundu and Abdussalam v SSHD [2014] UKUT 377 (IAC) where the Upper Tribunal considered it to be clear from s. 29 and Rule 10 that the power to make wasted costs orders applies to all proceedings whether in the context of judicial review or otherwise.
20. I conclude that the power to make a wasted costs order exists in the Upper Tribunal but I do not consider, on the basis of the terms of s.29(5)(a) that the acts or omissions of the Secretary of State in this case can properly be characterized as improper, unreasonable or negligent. I note the points made at paragraphs 20-25 of the response, but, though I do not think the respondent's conduct is free of criticism, none of the necessary criteria are, in my judgment, made out. I therefore decline to make a wasted costs order.

Signed

Date **21 November 2014**

Upper Tribunal Judge Allen